CONSTITUTIONAL LAW IN 1917–1918. I

THE CONSTITUTIONAL DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN THE OCTOBER TERM, 1917[1]

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I. INTERSTATE COMMERCE

POWERS OF CONGRESS UNDER THE COMMERCE CLAUSE

The federal Child Labor Law was declared unconstitutional in Hammer v. Dagenhart[2] by a vote of five to four.[3] It forbade the transportation in interstate or foreign commerce of the product of any mine or quarry "in which within thirty days prior to

[1] For preceding reviews of Supreme Court decisions on constitutional questions, see *American Political Science Review*, (1910) IV, 483–497; (1912) VI, 513–523; (1915) IX, 36–49; (1918) XII, 17–49, 427–457, 640–666.

[2] (1918) 247 U. S. 251. See Thurlow M. Gordon, "The Child Labor Law Case," 32 *Harvard Law Review* 45; Frederick Green, "Social Justice and Interstate Commerce, 208 *North American Review* (September, 1918) 387; William Carey Jones, "The Child Labor Decision," 6 *California Law Review* 395; T. I. Parkinson, "The Federal Child Labor Decision," *The Child Labor Bulletin*, vol. 7, no. 2, p. 89 (August, 1918); and T. R. Powell, "The Child Labor Decision," *The Nation*, vol. 107, p. 730 (June 22, 1918), and "The Child Labor Law, the Tenth Amendment, and the Commerce Clause," 3 *Southern Law Quarterly* 175. See also editorial notes in 86 *Central Law Journal* 441, 17 *Michigan Law Review* 83, and 27 *Yale Law Journal* 1092. For articles on the subject written prior to the decision of the Supreme Court, see H. C. Gleick, "The Constitutionality of the Child Labor Law," 24 *Case and Comment* 801; Frederick Green, "The Child Labor Law and the Constitution," *Illinois Law Bulletin*, no. 2, p. 3; Henry Hull, "The Federal Child-Labor Law," 31 *Political Science Quarterly* 519; and T. I. Parkinson, "Brief for the Keating-Owen Bill," *The Child Labor Bulletin*, vol. 4, no. 4, pt. 2, p. 219 (February, 1916), "Constitutional Prohibitions of Interstate Commerce," 16 *Columbia Law Review* 367, and "The Federal Child Labor Law," 31 *Political Science Quarterly* 531.

[3] The majority consisted of Chief Justice White and Justices Day, Van Devanter, Pitney and McReynolds; the minority, of Justices McKenna, Holmes, Brandeis and Clarke.

the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work," with similar prohibitions covering the products of mills and factories in which children under fourteen were employed or children under sixteen were employed more than eight hours a day. The majority opinion misinterpreted the statute and assumed that it permitted goods "to be freely shipped after thirty days from the time of their removal from the factory," whereas it permitted only the shipment of stock on hand thirty days after children had ceased to be employed. The law was so framed as to avoid the necessity of proof that children coöperated in the making of specific articles produced in a factory in which children were employed, and yet to remove any ban on shipment from an establishment which for thirty days had employed only adult labor.

No fault was found with the statute under the due-process clause of the Fifth Amendment, nor was there any consideration of the question whether the prohibition on foreign commerce might be sustained although that on interstate commerce was void. Not a few opinions of the Supreme Court, it will be recalled, have implied that the power over foreign commerce is absolute. Such declarations, however, probably have no bearing on a statute which a court holds not to be a regulation of commerce at all.

The Child Labor case came before the court in a bill brought by two children through their father as "next friend" against a federal district attorney to enjoin the enforcement of the act. The propriety of the procedure was not questioned in the Supreme Court. The injunction granted below was sustained on the ground that the act was unconstitutional in that it was not a regulation of interstate commerce and was an invasion of the reserved powers of the states prohibited by the Tenth Amendment. Mr. Justice Day, for the majority, said that "the act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states." To this, the minority answered through Mr. Justice Holmes that it did

both: "The statute in question is within the power expressly given to Congress if considered only as to its immediate effects; . . . . if invalid it is so only upon some collateral ground." The majority concentrated their attention on the collateral ground which the minority thought was not within the competence of the court to consider, pointing out that previously the court had "excluded any inquiry into the purpose of an act which apart from that purpose was within the power of Congress."

In dealing with the precedents which had sanctioned congressional prohibitions of interstate transportation, Mr. Justice Day declared that "in each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results," whereas the products of child labor "are in themselves harmless." To this, Mr. Justice Holmes answered: "It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil."

As to the Tenth Amendment, the majority insisted that the act regulated manufacture and that the regulation of manufacture was one of the reserved powers of the states. The answer of the minority was as follows:

"The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries, the State encounters the public policy of the United States which it is for Congress to express."

In his dissent in the Child Labor case, Mr. Justice Holmes cites Weeks v. United States[4] for the point that the federal Pure Food and Drug Act had been held to apply "not merely to arti-

[4] (1918) 245 U. S. 618.

cles that the changing opinions of the time condemn as intrinsically harmful but to others innocent in themselves simply on the ground that the order for them was procured by preliminary fraud." The Weeks case involved the shipment in interstate commerce of an article labeled "Special Lemon, Lemon Terpene and Citral." The circuit court of appeals had reversed the conviction of the defendant on the count which charged him with shipping goods bearing a false and misleading label, but sustained that on the second count charging the shipment of articles misbranded by reason of being "offered for sale under the distinctive name of another article." To sustain this count, evidence had been offered showing that the defendant's solicitor had secured the order by falsely representing that the article was pure lemon oil, though of second quality, and by exhibiting a sample bottle labeled merely "Special Lemon." These representations made in the intended state of destination were declared by the Supreme Court to be acts of interstate commerce and to make the shipment of articles that did not conform to the representations a violation of the act.

The constitutional questions involved in St. Louis Southwestern Ry. v. United States[5] are somewhat difficult to disentangle from those of statutory construction. The interstate commerce commission had found that Paducah, Kentucky, was discriminated against in favor of Cairo, Illinois, by reason of the facts that shipments of lumber from the South, instead of being sent by the shortest route to Paducah, were routed by way of Cairo, and the local rate from Cairo to Paducah added to the rates from the South to Cairo. The commission ordered the roads to reduce the Paducah rate to the level of the Cairo rate, leaving them free, however, to ship by the longer or shorter route. One road which participated in the traffic, but which did not reach the points of ultimate destination, contended that the order was not a regulation of interstate commerce and was wanting in due process because it compelled it to enter against its will into a partnership with other roads. But the court answered that the road was left free to pick any connecting carrier

[5] (1917) 245 U. S. 136.

it chose and therefore could still choose its partners, that it was not compelled to undertake any interstate commerce other than that in which it was already engaged, that it was discriminating against Paducah as effectively as if its own rails reached that point, and that its acts were therefore within the commerce power of Congress.

Illinois Central Railroad Co. v. Public Utilities Commission,[6] though concerned chiefly with matters of procedure and issues of fact, touches constitutional questions obliquely through the reasoning in the opinion. The decision reaffirmed federal power to prevent discrimination in interstate rates by ordering the raising of intrastate rates; but, on account of the vagueness of the order of the interstate commerce commission relied on, it applied the principle that it should never be held that a federal authority "intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested."

THE COMMERCE CLAUSE AND THE POWERS OF THE STATES

A. State Taxation and Interstate Commerce

The cases in which it is urged that state taxes are unwarranted regulations of interstate commerce fall into two main groups. In the first group the issue is whether the complaining taxpayer is entirely exempt because the tax is imposed directly on interstate commerce.

York Mfg. Co. v. Colley[7] held that the installation and testing of an ice-manufacturing plant in pursuance of a contract for the sale thereof was so essential to the sale as to be regarded as interstate commerce when the sale was interstate. No permit therefore could be required by a state of a company whose only business within the state was such necessary adjustment of a product shipped from without the state.

[6] (1918) 245 U. S. 493. See 18 *Columbia Law Review* 270, 31 *Harvard Law Review* 1031, and 16 *Michigan Law Review* 379.

[7] (1918) 247 U. S. 21. See 27 *Yale Law Journal* 1094.

But General Railway Signal Co. v. Virginia[8] passed a different judgment on the work of inaugurating a signal system brought from without the state. The work of digging ditches for conduits, and of constructing and painting concrete foundations, which was necessary to the adjustment of the apparatus, was thought to be sufficiently distinct from the interstate part of the entire transaction as to subject the contractor to the taxing power of the state.

So in Dalton Adding Machine Co. v. Virginia[9] no immunity was granted to a corporation that kept in the state a stock of machines for exhibition and trial, exchanged and rented machines located in the state, sold repair parts and accessories from local stock, maintained a repair department and occasionally sold machines from local stock. The opinion of Mr. Justice McReynolds contented itself with stating that a material part of the business was intrastate, without passing judgment on each of the several elements.

In Cheney Brothers Co. v. Massachusetts[10] a state was forbidden to impose a license tax on a foreign corporation that made no local sales but merely maintained an office as headquarters for salesmen and as a place of storage for samples. All orders obtained in Massachusetts were filled from stock in Connecticut, and no orders were binding until accepted in Connecticut.

Five other corporations dealt with in this case were all held to be engaged in independent, intrastate business. The Copper Range Co. and the Champion Copper Co. conducted their fiscal affairs within the state. The Lanston Monotype Co. kept in the state a stock of material necessary for repair work, which it sold and attached when repairs were called for. The Locomobile Company did the same and also exchanged and sold second-hand cars. The Northwestern Consolidated Milling Co. kept agents in Massachusetts who solicited business from Massachusetts retailers and turned the orders over to Massachusetts

[8] (1918) 246 U. S. 500. See 87 *Central Law Journal* 4.
[9] (1918) 246 U. S. 498.
[10] (1918) 246 U. S. 147.

wholesalers to be filled from Massachusetts stock. The fact that the solicitors were not agents of the local wholesalers but acted for the manufacturers without the state was held not important.

The other group of cases deals with complaints that taxes on proper subjects are assessed by methods which involve regulation of interstate commerce.[11]

In Looney v. Crane Co.,[12] International Paper Co. v. Massachusetts,[13] and Locomobile Co. of America v. Massachusetts,[14] it was held that excises on foreign corporations which combine local manufacture or local sales with interstate sales cannot be measured by total capital stock. This had previously been established in respect to foreign corporations engaged in combined local and interstate transportation, and some of the opinions had seemed to rely especially on the economic integration of such local and interstate business. But the court now regards this element as immaterial. In the International Paper case, Mr. Justice Van Devanter observes: "True, those were cases where the business, interstate and local, in which the foreign corporation was engaged was that of a common carrier. But the immunity of interstate commerce is not confined to what is done by the carriers in such commerce. On the contrary, it is universal and covers every class of interstate commerce, including that conducted by merchants and trading companies."

It had previously been held that the vice of the measure of total capital stock could be cured by setting a reasonable maximum to the annual imposition. The highest maximum heretofore considered was $2,500. In General Railway Signal Co. v.

[11] For general articles on the decisions grouped under this head see George E. Hinman, "Legal Phases of State Income Taxation of Miscellaneous Corporations," 3 *Bulletin of the National Tax Association* 41, 67; and T. R. Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 *Harvard Law Review* 572, 721, 932, "State Excises on Foreign Corporations," *Proceedings of the National Tax Association*, 1918, and "The Changing Law of Foreign Corporations," 33 *Political Science Quarterly* 549.

[12] (1917) 245 U. S. 178. See 3 *Bulletin of the National Tax Association* 99, 18 *Columbia Law Review* 168, and 16 *Michigan Law Review* 264.

[13] (1918) 246 U. S. 135. See 3 *Bulletin of the National Tax Association* 178, 16 *Michigan Law Review* 447, and 27 *Yale Law Journal* 1074.

[14] (1918) 246 U. S. 146.

Virginia,[15] however, the court sanctioned a tax measured roughly by capital stock, which might go as high as $5,000. Weight was attached to the fact that the tax did not ascend *pari passu* with each increase of capital, but corporations were put in classes, as their capital was between ten and twenty, twenty and thirty, million and so on. All corporations with a capital between one and ten million paid $1,000. This was the amount sustained in the case, but the court observed that "it seems proper, however, to add that the case is on the border line." The decision was said to be dependent on all the facts of the case, and the court rendered a rather Scotch verdict by limiting its enthusiasm to the statement that "under all the circumstances we cannot say that this is wholly arbitrary or unreasonable."

Wisconsin income taxes came before the court in two cases, in both of which the taxes were held not to regulate interstate commerce. Northwestern Mutual Life Ins. Co. v. Wisconsin[16] dealt with a tax of three per cent on the gross income of insurance companies, exclusive of income from Wisconsin real estate and from premiums collected outside of Wisconsin on policies on the lives of nonresidents. The tax was in lieu of all other taxation upon personal property. The company alleged that some of this income was from interstate commerce, but the Supreme Court, without passing on the validity of the claim, held that it was not material, as the tax was in the nature of a commutation tax, and was but a method of determining the value of the property within the state.

United States Glue Co. v. Town of Oak Creek[17] sustained the general income tax of Wisconsin which was based, not on gross, but on net income from all sources, including interstate commerce. Such burden as this imposed on interstate commerce was declared to be indirect only, and not to amount to a regulation of that commerce. It was distinguished from a tax measured by gross receipts, in that it did not vary directly with the volume of business, and therefore did not have the tendency to impede or

[15] Note 8, *supra*.
[16] (1918) 247 U. S. 132.
[17] (1918) 247 U. S. 421.

discourage the business that a tax on gross receipts would have. "Such a tax, when imposed on incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises valued as property." It was said to constitute "one of the ordinary and general burdens of government."

This general income tax based on net income is to be contrasted with a special tax on selected occupations measured by gross receipts. Such a tax was held in Crew Levick Co. v. Pennsylvania[18] to constitute a burden on foreign commerce, in so far as it sought to reach receipts from such commerce. The tax in question was said to bear "no semblance of a property tax, or a franchise tax in the proper sense," nor to be "an occupation tax, except as it is imposed upon the very carrying on of the business of exporting merchandise," which chanced to be the business in which the complainant was engaged. This remark of the court seems to be due to the desire to find a way to disregard the earlier case of Ficklen v. Shelby County Taxing District,[19] without confessedly overruling it; but the Ficklen case must probably be regarded as overruled, unless it can be discovered to have involved a tax which was really in lieu of a property tax. That taxes on gross receipts in lieu of all other taxes are applicable even to receipts from interstate commerce was reiterated in Cudahy Packing Co. v. Minnesota.[20]

In sustaining the general income tax of Wisconsin, measured by net income, the court relied on Peck & Co. v. Lowe,[21] decided two weeks earlier, which held that the general federal income tax was not a tax on exports even when the income was the fruit of an exporting business. Here again the court drew the distinction between direct and indirect, immediate and remote effect, and relied on the fact that the tax in question was a gen-

[18] (1917) 245 U. S. 292. See 3 *Bulletin of the National Tax Association* 99, 18 *Columbia Law Review* 483, 31 *Harvard Law Review* 805, and 3 *Southern Law Quarterly* 230.

[19] (1892) 145 U. S. 1.

[20] (1918) 246 U. S. 450.

[21] (1918) 247 U. S. 165. See 87 *Central Law Journal* 4, and 27 *Yale Law Journal* 1096.

eral tax. Whether a general income tax measured by gross receipts, which was not in lieu of all other taxes, could include receipts from sources not directly taxable has not been decided, but the tenor of the opinion in the Wisconsin Income Tax case seems to negative the possibility.

The complaint made against the Virginia license tax on those carrying on a merchandise business, which came before the court in Armour & Co. v. Virginia,[22] was that the exemption of manufacturers selling merchandise at the factory operated to discriminate against interstate commerce. A Virginia manufacturer might use his factory as an emporium without paying the merchants tax to which foreign manufacturers who wished a similar *locus disponendi* within the state would be subjected. But the court held that the alleged discrimination was based on a valid distinction between sales at the factory and elsewhere, and that such disadvantage as foreign manufacturers suffered "was a mere indirect consequence of a lawful and non-discriminatory exercise of state authority," and violated no clause of the federal Constitution.

B. State Police Power and Interstate Commerce

The effect of the Webb-Kenyon Law on state power over intoxicating liquor in interstate transit came before the court again in Seaboard Air Line Ry. v. North Carolina,[23] which sustained a state statute requiring railroad companies to keep a book containing the names of all consignees of liquor shipments, and to permit any citizen to inspect the same. It was urged that, as the state did not prohibit the receipt or possession of liquor, it could not require publicity as to the recipients. But the court affirmed that it had been already held that under the Webb-Kenyon Law "a state may inhibit shipments therein of intoxicating liquors from another by a common carrier although intended for the consignee's personal use where such use

[22] (1918) 246 U. S. 1.

[23] (1917) 245 U. S. 298. See 86 *Central Law Journal* 41, and 31 *Harvard Law Review* 659.

is not actually forbidden." From this it was declared to follow that the state could make the shipment a penal offense, although possession and consumption was not, and that the power to prohibit necessarily includes the lesser power of imposing conditions intended to secure publicity.[24] Mr. Justice Van Devanter dissented, without opinion.

Two efforts of Texas to secure improved transportation service were resisted as interferences with interstate commerce. In Gulf C. & S. F. Ry. Co. v. Texas,[25] a statutory requirement that four trains each way be stopped at county seats, if so many trains were run, was sustained in spite of the interference with interstate commerce resulting from the delay of two interstate trains. The particular county seat in question had a population of only 1,500, and the court seemed to be of the opinion that the order would not be justified by the needs of the local community even though the town would otherwise be without direct sleeping-car service. The controlling factor in the decision was deference to the state's judgment of the needs of county seats. The statutes of the state provided for a penalty not to exceed $5,000 for every failure to obey a lawful order, and the road was fined $22,400, which was $100 for each failure to obey the order in question. This fine was sustained, on the ground that the road had only itself to blame for its sad plight, since it had failed to avail itself of the privilege offered by the state to bring a suit to test the validity of the order. Mr. Justice Holmes remarked, however, that "the case in all its aspects is somewhat extreme," and the Chief Justice and Justices McKenna and McReynolds dissented.

A different fate met the order of the state commission requiring passenger trains within the state to "start from their point of origin and from stations on the line in accordance with advertised schedule, allowing them not to exceed thirty minutes at origin or points of junction with other lines to make connec-

[24] The case seems to go further than Clark Distilling Co. v. Western Maryland Ry. Co., (1915) 242 U. S. 311, and to hold that the Webb-Kenyon Law applies even though the state prohibits neither receipt nor possession. See 2 *Southern Law Quarterly* 118–124.

[25] (1918) 246 U. S. 58.

tion with trains on such other lines, and not exceeding ten minutes more if at the end of thirty minutes the connecting trains were in sight." Missouri, K. & T. Ry. Co. v. Texas[26] held that this order, in so far as it undertook to fix the time allowed for stops in the course of interstate transit, imposed a burden that "not only was serious but was unwarranted as well as unjust." The court was of opinion that the company would not comply with the order by substituting another train for the legally advertised train, but declared that this was hardly practical even if under the order it would excuse the delay of the advertised train.

In International & G. N. Ry. Co. v. Anderson County[27] the court passed adversely on a contention that the observance of a provision in the charter of a railroad corporation, forbidding the removal of its shops and offices from a county which had issued bonds in consideration of such location, imposed a burden on interstate commerce owing to the expansion of the road and the character of its interstate business. The jury at the trial had found that no such burden was in fact imposed. The Supreme Court prefaced its consideration of the contention by saying that "the acceptance of the charter by the plaintiff in error disposed of every constitutional objection but one," thus leaving room for the implication that provisions in corporate charters may come to constitute invalid regulations of interstate commerce—a position that would seem to require the overruling of previously unquestioned adjudications.[28] An explicit decision on the question was rendered unnecessary by the ruling that no burden was imposed. On this point Mr. Justice Holmes observed: "So far as the question depended on the testimony adduced before the jury the verdict must be accepted, and although no doubt there might be cases in which this court would pronounce for itself, irrespective of testimony, whether a burden was imposed, we are not prepared to say that in this instance

[26] (1918) 245 U. S. 484.

[27] (1918) 246 U. S. 424.

[28] See Railroad Co. v. Maryland, (1875) 21 Wall. 456; Ashley v. Ryan, (1894) 153 U. S. 436; and Kansas City, M. & B. R. Co. v. Stiles, (1916) 242 U. S. 111. But see State v. Western & Atlantic R. Co., (1912) 138 Ga. 835, 76 S. E. 77, and note in 26 *Harvard Law Review* 539.

the State has transcended its powers. The burden if any is indirect."

The desire of Massachusetts to regulate the distribution in the state of quotations of the New York Stock Exchange was frustrated by Western Union Telegraph Co. v. Foster[29] on the ground that the distribution was interstate commerce. The state relied on the fact that the quotations, after being received in Boston over interstate wires in the Morse Code, were then translated into the vernacular and distributed to tickers. It appeared, however, that the ultimate recipients of the quotations were determined by the New York Exchange before the message started from that city. The court said that it did not matter that these recipients had no direct contract relations with the New York Exchange, and held that the interstate character of the transmission was not at an end until the information reached its ultimate destination, thus refusing to develop a new sort of original-package rule to apply to such transactions.

Mr. Justice Holmes observed that the character of the intercourse was to be determined by "practice, intent and the typical course," and not by "title or niceties of form," and he declared that "if the normal contemplated and followed course is a transmission as continuous and rapid as science can make it from Exchange to broker's office, it does not matter what are the stages or how little they are secured by covenant or bond." The effort to support the state power on state control over the streets met with the answer that "acts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result."

Constitutional principles were the substratum of two cases[30] which held that, in a prosecution by a state for keeping opium unlawfully, it was error to exclude evidence showing that the acts which detained the opium in the state were incidental to exportation which had been authorized by the treasury department of the federal government, as this bore on the question

[29] (1918) 247 U. S. 105.

[30] McGinnis v. California, (1918) 247 U. S. 91, and Same v. Same, 247 U. S. 95.

whether the goods were in transit when seized. The principle involved is that the state cannot apply its police power to articles which are moving in interstate or foreign commerce as fast as can be reasonably expected.

An echo of the Minnesota rate cases came before the court in Northern Pacific Ry. Co. v. Solum,[31] in which shippers had recovered in the state court the excess of an interstate over an intrastate rate between two points. The state court had declared that it was the duty of the carrier to ship over the shorter and cheaper intrastate route, but the Supreme Court held that this depended upon circumstances which were primarily for judgment of the interstate commerce commission, and that the state court was without authority to adjudicate the controversy until this essentially administrative question had been passed upon by the commission. With reference to the jurisdiction of the commission and the corresponding inhibition on state authorities, it was said curtly that "it is sufficient that one of the routes is interstate." The company's reason for using the interstate route was that the shorter intrastate route had severe grades. It used this route for traffic going in the opposite direction.

II. GOVERNMENTAL RELATIONS BETWEEN THE STATES AND THE UNITED STATES

The familiar principle that the Constitution presupposes the continued existence and effectiveness of both the state and national governments, and that neither government can through the exercise of its powers interfere with the necessary instrumentalities of the other, was relied on in a number of cases, but in none was the principle found to have been violated. Omaechevarria v. Idaho[32] held that the police power of a state may be exercised to arrange priorities of grazing privileges over the public domain of the United States, so long as such provisions con-

[31] (1918) 247 U. S. 477. See 2 *Minnesota Law Review* 339.

[32] (1918) 246 U. S. 343; 31 *Harvard Law Review* 1164. This case is also considered in the section dealing with police power. Justices Van Devanter and McReynolds dissented, but without indicating upon what ground.

flict with no federal statute. Sweet v. Schock[33] and McCurdy v. United States[34] found that the Indian lands with which they respectively had to deal had sufficiently passed from federal control to be subject to state taxation. In Johnson v. Lankford[35] and Martin v. Lankford,[36] two cases growing out of the administration of Oklahoma's depositors' guarantee law, it was held that an action against the state bank commissioner for misfeasance is not a suit against the state, since a state officer may be delinquent without involving the state in delinquency.

A most important issue with respect to the relations between the state and federal governments was raised by the endeavor of Virginia to secure a writ of mandamus compelling the members of the West Virginia legislature to levy a tax to pay a judgment rendered against West Virginia in favor of Virginia. The court left for future determination the question whether the remedy asked for was available to the judgment creditor, but it very definitely rejected West Virginia's contention that the Tenth Amendment prohibited the Supreme Court from ordering a state legislature to exercise the governmental powers of the state.[37] An affirmative answer was given to the question: "May a judgment against a state as a state be enforced against it as such, including the right to the extent necessary for so doing of exerting authority over the governmental powers and agencies possessed by the state?" And the court prefaced its order that the case be restored to the docket for reargument on the question of remedies, by saying: "Accepting the things which are irrevocably foreclosed—briefly stated, the judgment against the state

[33] (1917) 245 U. S. 192.

[34] (1918) 246 U. S. 263.

[35] (1918) 245 U. S. 541. See 86 *Central Law Journal* 285, and 31 *Harvard Law Review* 1036.

[36] (1918) 245 U. S. 547.

[37] Virginia v. West Virginia, (1918) 246 U. S. 565. See T. R. Powell, "Coercing a State to Pay a Judgment," 17 *Michigan Law Review* 1. See also 12 *American Journal of International Law* 619, 31 *Harvard Law Review* 1158, and 16 *Michigan Law Review* 617. For a discussion of the problem written before the decision of the court, see William C. Coleman, "The State as Defendant under the Federal Constitution," 31 *Harvard Law Review* 210.

operating upon it in all its governmental powers and the duty to enforce it viewed in that aspect. . . . ."[38]

III. POLICE POWER

The October term of 1917 is remarkable for the small number of cases involving questions of the police power. During the three preceding terms at least sixty-seven cases[39] passed on police measures either of the states or of Congress, and in nine cases[40] objections were sustained. Against this yearly average of twenty-two cases and annual death rate of three statutes and administrative orders during the preceding triennium, the year 1917–1918 reports only eight cases, with two decisions adverse to the claimed authority. If we exclude from consideration the cases dealing with public utilities, we have to contrast three cases sustaining police statutes with a previous average of twelve, and to note that one statute was declared unconstitutional during the past term and that the average for the three preceding terms was also one.

The most important police measure to come before the court was the Louisville segregation ordinance which forbade migration for residence purposes of persons of color to any block in which a majority of the residents were white, with a similar restriction on white infiltration into colored blocks. This was declared unconstitutional in Buchanan v. Warley,[41] on the ground that it unjustifiably interfered with the rights of property owners to dispose of their property as they saw fit, and therefore took their property rights without due process of law. The

[38] For a case that has some bearing on the question whether the federal government may tax income from state securities and from state salaries, see Peck v. Lowe, page 73 *infra*, note 65.

[39] Of these 67 cases, 39 were concerned with the general police power, and 28 with the control over public utilities.

[40] Six of these involved requirements on carriers.

[41] (1917) 245 U. S. 60. See S. S. Field, "The Constitutionality of Segregation Ordinances," 5 *Virginia Law Review* 81. See also 85 *Central Law Journal* 422, 18 *Columbia Law Review* 147, 3 *Cornell Law Quarterly* 133, 31 *Harvard Law Review* 475, 21 *Law Notes* 162, 16 *Michigan Law Review* 109, 2 *Minnesota Law Review* 57, and 27 *Yale Law Journal* 393.

race question appeared in the opinion only by way of alleged but insufficient justification.

The case before the court was evidently framed for the purpose of testing the constitutionality of the ordinance, as it arose from a bill brought by a white man against a negro for specific performance of a contract to purchase land for a residence in a white district, with a proviso that the purchaser should not be required to accept a deed and make payment unless he had a right under the law to occupy the premises as a residence. On behalf of the ordinance it was urged that it legitimately promoted the public peace and the public welfare by relieving the friction due to race conflicts, but Mr. Justice Day answered this by saying:

"That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may freely be admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges."

The discussion of the cases in which race separation in railway carriages and educational institutions had been sanctioned has some faint flavor of the notion that residential segregation might deny to negroes the equal protection of the laws; but the opinion as a whole zealously guards against putting the decision on any such ground. All that was found evil was the interference with freedom to dispose of city lots. Whether residential race segregation was good or evil was not passed upon, except to declare that it was not sufficiently meritorious to justify a restraint on the alienation of real estate.

The dryest law of any state was sustained in Crane v. Campbell,[42] which held that Idaho had not abridged the privileges and immunities of citizens of the United States, nor deprived persons of liberty without due process of law, by forbidding and penalizing the use or possession of intoxicating liquor. One paragraph of Mr. Justice McReynold's opinion regarded the prohibi-

[42] (1917) 245 U. S. 304. See 52 *American Law Review* 275, 31 *Harvard Law Review* 658, 4 *Iowa Law Bulletin* 116, 16 *Michigan Law Review* 386, 2 *Minnesota Law Review* 232, and 27 *Yale Law Journal* 575.

tion of possession as a proper means of preventing sale or gift. This was premised on "the notorious difficulties always attendant upon efforts to suppress the liquor traffic." The succeeding paragraph, however, said that the undoubted power to forbid manufacture, gift, sale, purchase or transportation necessarily negatived the existence of any constitutional right to possess, since "an assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the state."

This power to outlaw intoxicating liquor was also the basis of the decision in Eiger v. Garrity[43] which upheld an Illinois statute making a judgment against a liquor dealer for loss to dependents of his customers, by reason of his ministrations, a lien upon the premises in which the liquor was sold, provided the owner thereof knew of the use to which the premises were put. The landlord whose building was subjected to the liability in suit complained particularly that he was given no opportunity to be heard in the action against the saloon keeper in which the right of recovery was adjudicated and the *quantum* of damages assessed. But the court replied that he might protect himself by selecting his tenant and by fixing the amount of rent and in other ways, and that the statute in effect made the tenant the agent of the landlord. The owner's rights were said to be sufficiently guarded by allowing him to "be heard to deny the rendition of the judgment against the tenant, the making of the lease authorizing the sale of intoxicating liquor, or, if his knowledge of such use be the issue, he may be heard on that question."

From an Idaho sheep owner came the complaint that a statute prohibiting any person having charge of sheep from allowing them to graze on a range on the public domain previously occupied by cattle violated the Fourteenth Amendment by denying to sheep owners the equal protection of the laws and abridging their privileges as citizens of the United States. But Omaechevarria v. Idaho[44] held the complaint without merit, finding that

[43] (1918) 246 U. S. 88. See 86 *Central Law Journal* 313, and 27 *Yale Law Journal* 850.

[44] Note 32, *supra*.

under the circumstances cattle required a protection against encroachment by sheep that sheep did not need against cattle, since sheep would graze with cattle but cattle would not graze with sheep. Segregation was necessary, and, in view of the situation in the state, the adjustment made was regarded as fair to the interests of both groups of stock owners. Justices Van Devanter and McReynolds dissented, but whether on the due-process point or on the decision that the state had not trespassed on federal authority does not appear.

Five cases involved that branch of the police power which controls the activities of public-utility enterprises. Pennsylvania R. Co. v. Towers[45] held that where a railroad company has already established commutation rates for suburban service, the state may regulate such rates within the limit of reasonableness, and fix them below those charged for regular service, since the service to commuters is of a special character differing from general passenger service. Great Northern Ry. Co. v. Minnesota[46] sanctioned a requirement that a railroad company construct across its right of way a suitable sidewalk to connect with and correspond to the walk on the abutting property. Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic Association[47] sustained an order forbidding two railroads which owned and controlled a corporation having nominally independent terminal facilities from adding to long-haul rates an additional charge for switching over the terminal railroad, when no such charge was made for exactly similar service over the other terminals in the city operated and owned by the roads. The separate terminal corporation was found to be nothing but a facility used by the two roads jointly in the same way that they used their other separate terminals, and the court looked behind the corporate entity and found merely a device by which discrimination was accomplished.

The other two cases dealt with the reasonableness of rates. Manufacturers' Ry. v. United States[48] involved no novel ques-

[45] (1917) 245 U. S. 6. See 85 *Central Law Journal* 331, 18 *Columbia Law Review* 155, 16 *Michigan Law Review* 124, and 27 *Yale Law Journal* 404.

[46] (1918) 246 U. S. 434.

[47] (1918) 247 U. S. 490.

[48] (1918) 246 U. S. 457.

tion of law, but was concerned with somewhat complicated computations which were found to justify an order of the interstate commerce commission fixing rates for the use of terminal facilities. In Denver v. Denver Union Water Co.,[49] however, a most interesting and important question of law was raised. Whether the question was technically decided admits of doubt, owing to the dispute between the majority and the minority as to the proper interpretation of the ordinance complained of.

The city of Denver and the Denver Water Company had been haggling for some years over the purchase of the latter by the former, and had come to no agreement. Meanwhile the company's formal franchise had expired. The city thereupon passed the ordinance in question, prescribing certain rates and prefacing its requirement by a declaration that the company "is without a franchise and a mere tenant by sufferance of the streets." In view of this, Mr. Justice Holmes contended for the minority, consisting of himself and Justices Brandeis and Clarke, that the company's property should be valued at no more than what it would bring for other uses. Mr. Justice Pitney, however, speaking for the majority, insisted that the ordinance prescribing rates recognized a duty to continue the service and impliedly granted "a new franchise of indefinite duration, terminable by the city or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver." The property therefore must be valued as property in use, and not as junk. The majority opinion would have been stronger if it had omitted the argument that "the cost and detriment to a property owner attributable to the use of his property by the public . . . . are measured day by day, month by month, year by year, and are little influenced by the question how long the service is to continue." This neglects the fact that the plant would sell for considerably less than it would cost to reproduce it, on account of the power of the city to erect a new plant and to forbid the use of the old.

[49] (1918) 246 U. S. 178. See 31 *Harvard Law Review* 1036, 16 *Michigan Law Review* 438, and 27 *Yale Law Journal* 1095.

This is the point of Mr. Justice Holmes's query "how a company in that situation can assert a constitutional right to a return upon the value those pipes would have if there under a permanent right of occupation, as against a city that is legally entitled to reduce them to their value as old iron by ordering them to be removed at once." This being the legal situation, Mr. Justice Holmes brought to bear the argument that, as the company "could be stopped by the city out and out, the general principle is that it could be stopped unless a certain price is paid." He recognizes, however, that "this principle has not been applied in cases where the condition tended to bring about a state of things that there was a predominant public interest to prevent," but he finds no such predominant public interest here.

The possibility of exceptions to the rule relied on by the minority indicates plainly that the determining issue in each case must be one of policy. Mr. Justice Holmes seems to recognize a difficulty in his position when he remarks that "it may be said that to argue from such abstract rights is to discuss the case in vacuo—that practically the company cannot stop furnishing water without being ruined, or the city stop receiving it without being destroyed." This he concedes to be true, but he answers that "it also is true and not quite so tautologous as it seems, that the law knows nothing but legal rights," and that "the mutual dependence of the parties upon each other in fact does not affect the consequences of their independence of each other in law."

The solution of the difficulty seems to be that the city must go far enough in constructing a new plant to convince the water company that it is in earnest. Then a bargain may be made that will satisfy the city, whether it pleases the company or not. It is a pity that legal principles do not afford some way of compromise that can adjust such differences without sending the contestants back to their haggling.

IV. TAXATION

The cases previously referred to,[50] holding that excises on foreign corporations measured by total capital stock were invalid regulations of interstate commerce, declared also that the taxes took property without due process of law because in effect they fell on property outside the jurisdiction. Whether the same condemnation under the Fourteenth Amendment would be visited on similar taxes on foreign corporations not engaged in interstate commerce remains to be seen. The issue will depend upon whether the court is still of its ancient opinion that over such corporations the state holds a complete and arbitrary power to exclude or eject, which justifies any lesser burdens that may be concocted. An analogous view still obtains with respect to domestic corporations, but there is rather strong evidence that the court plans to abandon the notion of arbitrary power over any foreign corporation, whether engaged in interstate commerce or not.

In International Paper Co. v. Massachusetts,[51] Mr. Justice Van Devanter stated as a distinct proposition that "consistently with the due process clause, a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State." A tax measured by total capital stock was said to be on the entire property of a corporation, notwithstanding the fact that it is "declared by the State imposing it to be merely a charge for the privilege of conducting local business therein." This statement had reference to foreign corporations "doing both a local and interstate business in several states," but no reference to the kind of business in which a corporation was engaged was included in the earlier statement that the power of the state over foreign corporations "is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action."

[50] Cited in notes 12, 13 and 14, *supra*.
[51] Note 13, *supra*.

In Cheney Brothers Co. v. Massachusetts[52] one of the complaining corporations contended that it was denied the equal protection of the laws because it was taxed more heavily than similar domestic corporations. In Northwestern Mutual Life Ins. Co. v. Wisconsin[53] a domestic corporation complained of a like discrimination in favor of foreign corporations. Both complainants relied unsuccessfully on Southern Railway Co. v. Greene,[54] which had held in 1910 that a foreign railroad corporation which had acquired in the state a large amount of property of a permanent character had thereby become "a person within the jurisdiction" and could object to increases of taxation not suffered by domestic corporations similarly situated. In distinguishing the Greene case, the opinions of the court indicated that the doctrine is confined to corporations whose property is of a kind not readily susceptible of other uses, and that such corporations can object only to discriminatory increases.

Another complaint against discrimination alleged to be a violation of the equal-protection clause was rejected in Sunday Lake Iron Co. v. Wakefield.[55] It was evident that in the year 1911 the company's property had been assessed at its full value, while other property in the township and county was generally assessed at not more than a third of its true worth. This relative overassessment was thought by the victim to bring the situation within an earlier decision[56] which established, as the court recognized, that "intentional, systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." But the court found that in the case at bar the injustice was due to an honest inadvertence, had not occurred before or since, and therefore came within the rule that mere errors of judgment will not support a claim of unconstitutional discrimination.

[52] Note 10, *supra*.
[53] Note 16, *supra*.
[54] (1910) 216 U. S. 400.
[55] (1918) 247 U. S. 350.
[56] Raymond v. Chicago Union Traction Co., (1907) 207 U. S. 20.

Readers of the review of decisions for the three preceding years may recall the assessment of benefits for street paving by a method that Mr. Justice Holmes called "a farrago of irrational irregularities throughout."[57] The state court, in interpreting the mandate of the Supreme Court, sustained the one-fourth part of the tax assessed according to foot frontage, but declined to make a new assessment of the three-fourths' part unconstitutionally apportioned. The quarrel came to the Supreme Court again in Schneider Granite Co. v. Gast Realty & Investment Co.,[58] which sustained the state court in both its rulings, but pointed out that nothing in the federal Constitution prevented a new assessment in substitution for the one declared invalid. But whether it should be made, and, if so, whether by the state court or by some other authority, were said to be matters of state law with which the Supreme Court was not concerned.

The situs for taxation of intangibles, which has been a fruitful source of litigation, came before the court again in Fidelity & Columbia Trust Co. v. Louisville[59] in which all the court but the Chief Justice agreed that bank deposits in Missouri were taxable to their owner at his domicile in Kentucky. The statement of the case included the information that the deposits were not used by the owner in his Missouri business, but belonged absolutely to him; but this element was not mentioned in the opinion. The Kentucky tax was said to be one upon the person, "imposed, it may be presumed for the general advantages of living within the jurisdiction," and it was observed that "these advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed." Neverthe-

[57] See 12 *American Political Science Review* 451.

[58] (1917) 245 U. S. 288.

[59] (1917) 245 U. S. 54. See 3 *Bulletin of the National Tax Association* 77, 85 *Central Law Journal* 441, 31 *Harvard Law Review* 786, 62 *Ohio Law Bulletin* 533, and 3 *Virginia Law Register* n. s. 775. On the general subject, see Charles E. Carpenter, "Jurisdiction over Debts for the Purpose of Administration, Garnishment, and Taxation," 31 *Harvard Law Review* 905. Mr. Carpenter does not mention the principal case, although it was discussed in a note in the *Harvard Law Review* two issues before the publication of his article.

less it was later declared that "it is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like the present," because, "whichever this tax technically may be, the authorities show that it must be sustained." It was assumed that the deposits were taxable also in Missouri, but Mr. Justice Holmes observed that "liability to taxation in one State does not necessarily exclude liability in another," and the rules of jurisdiction over chattels were declared not to extend to intangibles.

That the taxing power may be used to raise funds to establish a municipal wood yard to sell fuel without profit was decided in Jones v. Portland.[60] The court recognized fully that the Fourteenth Amendment prevents the use of the taxing power for any but a public purpose, and that the Supreme Court must decide what purposes are public, but it observed that the test may vary with local conditions and that the judgments of state legislatures and state courts must be given great weight. While much of Mr. Justice Day's opinion seemed to rest the decision chiefly on the approving opinion of the state court, reference was made to a decision of another state court sanctioning the use of taxation to establish a municipal heating-plant, and it was said that "we see no reason why the state may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution."

The federal income tax of 1913 brought eleven cases to the Supreme Court, but only three of them proceeded on constitutional grounds. Lynch v. Hornby[61] held that cash dividends paid to stockholders after the effective date of the statute were taxable to them as income, although they came from a surplus accumulated by the corporation before the enactment of the

[60] (1917) 245 U. S. 217. See C. C. Maxey, "Is Government Merchandising Constitutional?" 52 *American Law Review* 215. See also 86 *Central Law Journal* 21, 3 *Cornell Law Quarterly* 287, 16 *Michigan Law Review* 263, 46 *Washington Law Reporter* 202, and 27 *Yale Law Journal* 824.

[61] (1918) 247 U. S. 339.

Sixteenth Amendment. Peabody v. Eisner[62] applied the same doctrine to a distribution among stockholders of stocks of other than the distributing corporation. Such a distribution was held to constitute income of the stockholders, in contradistinction to a stock dividend of extra shares in the corporation of which they are members. Such stock dividends were regarded in Towne v. Eisner[63] as not income to the stockholder but as scraps of paper rearranging the indicia of his interest in the corporate assets.

This decision was carefully confined to the interpretation of the word "income" as contained in the act of Congress,[64] leaving it still to be determined whether stock dividends can be regarded as "income" within the meaning of the Sixteenth Amendment. On this point Mr. Justice Holmes remarked: "But it is not necessarily true that income means the same thing in the Constitution and the Act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Later statutes of Congress will make it necessary to determine whether the Sixteenth Amendment authorizes the taxing of stock dividends as "income." What is already established is that, if a stockholder gets what to him is income after the effective date of the Amendment and the statute,

[62] (1918) 247 U. S. 347.

[63] (1918) 245 U. S. 418. See F. R. Fairchild, "The Economic Nature of the Stock Dividend," 3 *Bulletin of the National Tax Association* 162. See also 86 *Central Law Journal* 104, 18 *Columbia Law Review* 63, 31 *Harvard Law Review* 787, 805, 2 *Minnesota Law Review* 284, 3 *Southern Law Quarterly* 67, and 27 *Yale Law Journal* 553.

[64] Among other interpretations put upon the meaning of the word "income" as contained in the statute were the decisions that it does not embrace alimony (Gould v. Gould, 1917, 245 U. S. 151) nor a transfer of assets from one corporation to another which is the sole owner of the transferring corporation (Southern Pacific Co. v. Lowe, 1918, 247 U. S. 330) nor a sum received by a stockholder in excess of the par value of his stock on the dissolution of the corporation, where such excess was due to increases in value during a long period before the effective date of the statute, which increase had reached its height before the act became effective (Lynch v. Turrish, 1918, 247 U. S. 221). Various accounting problems raised by the application of the statute were passed upon in Doyle v. Mitchell Bros. Co., 247 U. S. 179, Goldfield Consolidated Mines Co. v. Scott, 247 U. S. 126. Hays v. Gauley Mountain Coal Co., 247 U. S. 189, and United States v. Biwabik Mining Co., 247 U. S. 116, all decided in 1918.

that income has no immunity because its economic origins antedated the Sixteenth Amendment.

The third decision on constitutional questions presented by the federal income tax is Peck & Co. v. Lowe,[65] already referred to, which held that a tax on net income from an exportation business is not a "tax or duty on articles exported from any state." In support of the decision Mr. Justice Van Devanter declared: "At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses."

From the standpoint of the bearing of this decision on the question whether Congress may now tax the income from state and municipal bonds, note must be taken of the following extract from the opinion:

"The Sixteenth Amendment, although referred to in argument, has no real bearing and may be put out of view. As pointed out in recent decisions, it does not extend the taxing power to any new or excepted subjects, but merely removes all occasion, which otherwise might exist, for an apportionment among the states of taxes laid on income, whether it be derived from one source or another."

This reiterates that the words "from whatever source derived" which are contained in the Sixteenth Amendment confer no authority to tax income from state securities. The only bearing, then, of Peck & Co. v. Lowe upon that question lies in the possibility that a tax on the entire net income of an individual might possibly now be regarded as having only an indirect effect on such income as he might derive from the treasury of a state or municipality by way of salary or interest. This possibility, however, must be deemed somewhat remote, for there are few, if any, deductions to be made from the gross income from such sources before the taxable net income is derived, as there are from the gross income from an exporting business. The importance of the distinction between gross and net income was em-

[65] Note 21, *supra*.

phasized in United States Glue Co. v. Town of Oak Creek,[66] previously considered.

V. EMINENT DOMAIN

In McCoy v. Union Elevated R. Co.,[67] a hotel owner, who felt aggrieved because he recovered in the state court no damages for injuries claimed to be due to the erection of an elevated railroad in the street in front of his premises, asked the Supreme Court to hold that he had thereby been deprived of property without due process of law. The nub of the controversy was whether the road was entitled to deduct from the damages caused such benefits as the road conferred, even though those benefits were not peculiar to the plaintiff but were similar to what his neighbors also enjoyed from the increase of travel by their doors. The Supreme Court, in holding that general benefits need not be deducted, declared that all that the Fourteenth Amendment required was that just compensation be given for the damage, and that there was no guaranty that a person "shall derive a positive pecuniary advantage from a public work whenever a neighbor does."

Sears v. Akron[68] reiterated the familiar doctrine that, while the question whether the purpose for which land is taken by eminent domain is a public purpose can be settled finally only by the judiciary, the necessity for the taking and the extent of land to be taken are matters of legislative discretion, and that a state does not deny due process by affording owners no opportunity to be heard with respect to such necessity and extent. In this case the taking was by a city, which determined for itself, under legislative authorization, how much land it required for a municipal water project.

In Pennsylvania Hospital v. Philadelphia[69] it appeared that a city which had agreed for a consideration not to exercise the right

[66] Note 17, *supra*.

[67] (1918) 247 U. S. 354.

[68] (1918) 246 U. S. 242.

[69] (1917) 245 U. S. 20. See 2 *Minnesota Law Review* 373, and 3 *Virginia Law Register* n. s. 777.

of eminent domain through the grounds of a hospital, later proceeded to do so. "As the result of proceedings in the state court the purpose of the city was so shaped as to cause it to seek to take under the right of eminent domain, not only the land desired for the street, but the rights under the contract" not to use the power of eminent domain. The Supreme Court sustained the taking, but implied that the contract not to take in no way affected the situation, since it was initially void because the power of eminent domain could not be contracted away. The opinion of the Chief Justice is interesting for the statement that "if the possibility were to be conceded that power existed to restrain by contract the further exercise by the government of its right to exert eminent domain, it would be unthinkable that the existence of such right of contract could be rendered unavailing by directing proceedings in eminent domain against the contract, for this would be a mere evasion of the assumed power." This of course does not prevent a state court from taking a different view, since it may recognize as contracts what the federal Constitution would not require it to recognize, and may award damages for takings by eminent domain in excess of what the Supreme Court would require.

VI. COMPULSORY MILITARY SERVICE

If any genuine doubts existed as to whether the Supreme Court would sustain the Selective Service Law, they were effectively dispelled by the opinion of the Chief Justice in the Selective Draft Law Cases.[70] The argument that "compulsory military

[70] (1918) 245 U. S. 366. The "Selective Draft Law Cases" is the title given by the official reporter to Arver v. United States and five other cases decided in the same opinion. See 24 *Case and Comment* 821, 6 *California Law Review* 222, 4 *Iowa Law Bulletin* 122, 16 *Michigan Law Review* 376, and 27 *Yale Law Journal* 575.

For other cases involving interpretations or applications of the Selective Draft Law, see Jones v. Perkins, 245 U. S. 390; Goldman v. United States, 245 U. S. 474; Ruthenberg v. United States, 245 U. S. 480; and Kramer v. United States, 245 U. S. 478, all decided in 1918. In the Kramer case the contention was raised that the indictment was defective in that it did not state that the defendant who had failed to register was a citizen of the United States or a person not an enemy alien who had declared his intention to become such a citizen. The contention

service is repugnant to a free government" was said to be based on a premise "so devoid of foundation that it leaves not even a shadow of ground on which to base the conclusion," since "it may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." The contention that compulsory military service imposed involuntary servitude was similarly disposed of in the concluding paragraph of the opinion, in which it was said:

"Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as a result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement."

More distinctly legal consideration was given to the objection that Congress was not vested with the power exercised. It was pointed out that the provision of the Constitution relating to congressional power over the militia was entirely distinct from that giving power to raise and support armies, and that the limitations surrounding the exercise of the former had therefore no application to the use of the latter. To attempt to limit the power to raise armies to raising them by invitation was said to challenge the existence of all power, "for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power."

The argument that at the time of the adoption of the Constitution national citizenship was derivative from state citizenship

was held unfounded in view of the fact that all persons between the designated ages were required to register under the law and it was stated that the defendant was between the designated ages, thus holding that those not liable to service may still be required to register.

and that therefore Congress could not so exercise its power to raise armies as to cause national citizenship "to lose its dependent character and to dominate state citizenship" was said to deny to Congress the power to raise armies which the Constitution confers. "That power by the very terms of the Constitution, being delegated, is supreme." And to this was added that the Fourteenth Amendment, which completely "broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore, operating as it does upon all the powers conferred by the Constitution, leaves no possible support for the contentions made, if their want of merit was not otherwise so clearly made manifest."

The administrative provisions of the act were likewise found to be free from fault. The contention that the exemption of ministers and theological students was either an establishment of religion or a prevention of the free exercise thereof was found possessed of an unsoundness so apparent that it was not necessary to do more than state it. The alleged vesting in administrative officers of legislative and judicial power was found to be effectively disposed of by previous decisions. And it was declared that "the contention that the act is void as a delegation of federal power to state officials because of its administrative features is too wanting in merit to require further notice." Here perhaps one might have wished for fuller consideration, in view of the bearing of the question on other possible efforts at coöperation between the national and state governments.

In Cox v. Wood,[71] decided four months later, the claim that a person subject to the draft was entitled to be discharged because the call was for service in a foreign country was dismissed as not entitled to original consideration, since it had been effectively disposed of by what had been said in the Selective Draft Law Cases. All the arguments advanced in support of the claim were found to rest upon the erroneous confusion of the power over the militia with the power to raise and support armies.

(To be concluded.)

[71] (1918) 247 U. S. 3.